No. 92-510

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IN THE

# Supreme Court of the United States

October Term 1992

FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

DETROIT AUTO DEALERS ASSOCIATION, INC., *ET AL.*,

*Respondents.*

**ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF FOR THE DETROIT AUTO DEALERS ASSOCIATION, INC., *ET AL.*, IN OPPOSITION


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The Dealers hereby jointly oppose the cross-petition of the Federal Trade Commission for a writ of certiorari.

## OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 4, 1992, in accordance with an opinion of the court filed on January 31, 1992. It is reported at 955 F.2d 457 (6th Cir. 1992). It is reprinted 1a-49a.

A timely petition for rehearing and suggestion of rehearing en banc was denied by order filed on May 22, 1992. 202a-203a.

The initial decision of the Federal Trade Commission administrative law judge and the opinion and order of the Federal Trade Commission are reported at 111 F.T.C. 417 (1989), and reprinted at 118a-201a and 50a-117a.

## JURISDICTION

The petition for writ of certiorari in No. 92-333 was filed and served on August 20, 1992. The Cross-Petitioner Federal Trade Commission relies on Rule 12.3.

Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

Jurisdiction in the United States Court of Appeals for the Sixth Circuit was based upon 15 U.S.C. § 45 (c).

## STATEMENT

The facts and proceedings below are set forth in the petition of the Dealers filed in No. 92-333.

## ARGUMENT

The Federal Trade Commission acknowledges that if this Court denies the petition for certiorari filed by the Dealers in No. 92-333, then the issues raised by the FTC do not independently warrant certiorari. Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit ("FTC Pet.") at 3, 10. The Dealers agree. See Supreme Court Rule 13.5. The Dealers further assert that the FTC has failed to raise any issues that merit consideration by the Court even if the Court grants the Dealers' petition in No. 92-333.

### I. The Sixth Circuit Appropriately Remanded for Determination Whether Any Dealer Reduced Hours As a Result of Collective Bargaining or Violence and Force

The FTC argues that the Sixth Circuit erred in remanding to determine whether any individual Dealers reduced their

hours as a result of collective bargaining with a union or of union-directed violence and force. The court's remand, however, is exactly what should have happened *assuming the court accepted the arguments made by the FTC itself.* Because the remand is consistent with the FTC's own position, the FTC has pointed to no prior decision of this Court or any United States court of appeals that conflicts with it.

The FTC's position is that the nonstatutory exemption exists solely to further the public interest in collective bargaining and negotiations.[1] Brief for the Federal Trade Commission in Opposition to Petition for Writ of Certiorari in No. 92-333 ("FTC Opp. Br.") at 4. The FTC further asserts that the agreement in this case was "an *employer-led* agreement without collective bargaining," and thus not exempt. FTC Pet. at 8. [emphasis in original] The remand merely seeks to have the FTC determine whether in fact each participant joined the agreement without collective bargaining under circumstances which can fairly be termed employer-led. As explained by the court, "we remand for the Commission to determine whether there was a restraint on hours of showroom operation imposed by a union rather than by the collective agreement with and among the other dealers or the association." 24a.

There is no dispute that some Dealers entered into collective bargaining agreements with their unionized employees. The FTC conceded that *some* of these agreements imposed hours reductions. In what appears to be an effort to buttress its decision, the FTC phrased its finding in the negative:

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[1]The Dealers dispute this view, which so restricts the scope of the exemption as to frustrate valid policies of the labor laws by discriminating against non-union employees and their employers. Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in No. 92-333 ("Dealer Br.") at 8-16, and Reply to Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in No. 92-333 at 2-3.

"most of the contracts [with the Automotive Salesmen Association] expressly reserved to management the right to determine the business hours of the dealership." 60a. The use of the word "most" clearly implies that fewer than all of the contracts reserved the question of hours, *i.e.*, some of them imposed reductions in hours. This implication is more explicit at 73a, n.13, where the FTC identifies one dealership with a collective bargaining agreement that required a reduction of hours. The FTC discussed that agreement only to the extent of concluding that one contract cannot exempt all of the Dealers.[2] But the FTC did not consider whether that individual dealership (or any other similarly situated dealership) should be exempt. One of the issues on which the Sixth Circuit remanded is the one the FTC failed to address, which is whether that dealership, or any other dealership, reduced hours as a result of a collective bargaining agreement rather than of the alleged agreement among Dealers.

The second aspect of the issue remanded (*i.e.*, whether any Dealers were forced to close as a result of union-led violence) is to determine if, as argued by the FTC, each Dealer's reduction of hours was "employer-led." This is a significant issue. Both the Dealers and the FTC recognize that an agreement is more likely to be exempt if it results from a demand of the employees than if it is instigated by employers (though the parties disagree on the other criteria for the exemption). The

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[2]The conclusion is wrong. In several prior cases employers who did not engage in negotiations or enter into collective bargaining agreements were nonetheless exempt because they engaged in concerted actions with other employers who were enaged in collective bargaining. *Amalgamated Meat Cutters & Butchers Workmen of North America, Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F.Supp. 1298 (E.D. Wash. 1981).

FTC, for example, relies heavily on *Mackey v. National Football League*, 543 F.2d 206 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In *Mackey*, the exemption was denied because the concerted restriction was imposed to further the employers' business objectives rather than the employees' labor objectives. In other words, it was "employer-led" instead of "employee-led."

The Sixth Circuit agreed that the source of the impetus for closing is significant. It remanded to determine which Dealers, if any, were compelled to close by union directed violence and force; that is, which Dealers closed as a result of union-led activity rather than employer-led activity. This was not addressed by the FTC in its decision.

The FTC recognized the coercive tactics of the employees, 58a-61a, but did not consider whether those coercive tactics caused any individual Dealer to reduce its hours. The remand will require the FTC to address this issue, which its own brief demonstrates is important.

## II. The Court Appropriately Remanded the Case for Reconsideration of the Order

Contrary to the FTC's argument on page 9, the Sixth Circuit did not require the FTC to change any provisions in the order it issued or to substitute any provisions suggested by the court. It merely required the FTC to consider important matters concerning the breadth and burden of the order which it had overlooked prior to issuing it. A remand for this purpose does not conflict with any prior decision of this Court or of any other United States court of appeals. On the contrary, this is an appropriate action for the court to take. The failure to consider an important factor before issuing an order is an abuse of discretion. *Motor Vehicle Manufacturers*

*Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43-44 (1983).

If on remand the FTC considers the order provisions fully and fairly in light of the surrounding circumstances, it may then exercise its discretion in a lawful manner. It may then (though the Dealers expect it will not) even re-issue the same order.[3] That is, it is not necessarily the order which the court rejected, but the pro forma manner in which the FTC imposed it. A remand for that purpose is entirely proper.

[3]The court recognized that there are serious flaws in the order which the FTC is likely to perceive if it gives the order more than a cursory glance. It requires Dealers to be open for 64 hours every week of the year, including, for example, the week of December 21. During that week, the Dealers will be closed on Sunday, as required by state law. No employee will work Christmas Eve or Christmas Day. It would be virtually impossible to remain open 64 hours that week, or the weeks of New Years or Thanksgiving.

## CONCLUSION

The cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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